UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOM, INC., d/b/a CHIPCO INTERNATIONAL, LTD.,	***)***	
Plaintiff	***)***	
v.	***)***	***Civil No. 96-156-P-DMC***
ADELL PLASTICS, INC.,	***)***	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL OR AMENDMENT OF THE JUDGMENT

In this lawsuit over plastic resin used in the manufacture of gaming chips, the court has entered judgment for the plaintiff in the amount of $884,322.39 on a jury verdict finding for the plaintiff on its contract and breach-of-warranty claims and in favor of the defendant on its counterclaim for breach of contract. The defendant now moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, or, in the alternative, for a new trial or amendment of the judgment pursuant to Fed. R. Civ. P. 59.

I. Motion for Judgment as a Matter of Law

The plaintiff correctly points out that the defendant waived any entitlement to judgment as a matter of law by failing to make such a motion at the close of the evidence prior to submission of the case to the jury. *Simon v. Navon*, 71 F.3d 9, 13 (1st Cir. 1995) (citations omitted). Although the defendant moved for judgment as a matter of law at the conclusion of the plaintiff's case, this is insufficient to preserve the defendant's challenge to the sufficiency of the evidence adduced at trial.

Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 758-59 (1st Cir. 1994). This requirement exists to give the opposing party a fair chance to seek to reopen the record and redress any deficiencies prior to the submission of the case to the jury. *Id.* The First Circuit has recognized a "narrow exception" to this rule, but it is not applicable here.[1] *Id.* ("narrow exception" where court assures defendant issue is preserved and only "brief and inconsequential evidence" follows). The defendant's Rule 50 motion for judgment as a matter of law is therefore **DENIED.**

II. The Rule 59 Motion

The defendant also asks the court to order a new trial or amend the judgment pursuant to Rule 59. A new trial is appropriate only if "the verdict is so seriously mistaken, so clearly against the law or the evidence, as to constitute a miscarriage of justice." *Transamerica Premier Ins. Co. v. Ober*, 107 F.3d 925, 929 (1st Cir. 1997) (citations omitted). A motion for new trial is addressed to the court's discretion, but the court is not at liberty to grant such a motion merely because the judge disagrees with the verdict or would have made a different decision in a bench trial. *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996) (citations omitted). Similarly, the court may alter or amend a judgment under Rule 59(e) only to redress a "manifest error of law" or in light of newly discovered evidence. *F.D.I.C. v. World University, Inc.*, 978 F.2d 10, 16 (1st Cir. 1992).

a. Battle of the Forms

The defendant maintains the court erred in applying the recent First Circuit case of *Ionics,*

[1] The defendant relies on *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir.), *cert. denied*, 136 L.Ed.2d 121 (1996), in which the Fifth Circuit determined that a defendant's objection to the plaintiff's proposed jury charge was sufficient to put the plaintiff on notice that sufficiency of the evidence was at issue notwithstanding the lack of a Rule 50 motion at the close of trial. This is at variance with First Circuit case law.

Inc. v. Elmwood Sensors, Inc., 110 F.3d 184 (1st Cir. 1997), to the instant controversy. The issue discussed in *Ionics* involves the construction of section 2-207 of the Uniform Commercial Code ("UCC"), commonly referred to as the "battle of the forms" provision of the UCC. This case involves such a battle. As revealed by the record produced in connection with the defendant's summary judgment motion, and as previously discussed in detail by the court, *see generally* Order on Defendant's Motion for Summary Judgment (Docket No. 14) and Memorandum Decision on Defendant's Motion in Limine to Exclude Evidence Concerning Damages Exceeding the Purchase Price of the Resin ("*In Limine* Decision") (Docket No. 56), the plaintiff ordered plastic resin from the defendant using a purchase order form that was silent except for basic terms such as price and quantity, whereas the defendant shipped its product to the plaintiff with an invoice that included a series of contract terms — including a provision that limited any damages to the purchase price of the resin.

Relying on section 2-207, the court granted summary judgment in favor of the defendant as to any damages beyond the purchase price. Thereafter, the First Circuit issued its *Ionics* opinion. The issue surfaced anew when the defendant moved *in limine* to limit the evidence on damages consistent with the summary judgment order, and the plaintiff cited *Ionics* in opposition to the motion.[2] The court denied the defendant's motion *in limine*, further indicating that *Ionics* required revisitation of the court's construction of section 2-207 and that, in light of *Ionics*, the limitation-of-damages language in the invoices was *not* part of the contract or contracts at issue in this lawsuit.

[2] The plaintiff undertook a full elaboration of its position on *Ionics* in a supplemental trial brief, but unambiguously argued in opposition to the *in limine* motion that, in light of the recent First Circuit case, it was entitled to the full measure of damages notwithstanding the limitation language in the defendant's invoices. Plaintiff's Opposition to Defendant's Motion in Limine to Exclude Evidence Concerning Damages Exceeding the Purchase Price of the Resin (Docket No. 42) at 2 n.1.

The verdict ultimately returned by the jury obviously includes damages well beyond the purchase price of the resin.

The defendant asserts three distinct errors in connection with the court's application of the *Ionics* decision. First, the defendant contends, by ruling *in limine* that the evidence as to damages would not be limited to the purchase price, the court was essentially and unfairly granting summary judgment to the plaintiff on this issue *sua sponte* and without adequate notice to the defendant. Second, the defendant maintains that the *Ionics* rule is ultimately inapplicable in light of the evidence actually adduced at trial. Third, the defendant takes the position that the court's reading of *Ionics* is wrong in any event and that the limitation-of-damages provision is part of the parties' contract or contracts by operation of section 2-207.

The defendant's characterization of the court's *in limine* ruling is incorrect. The decision was not a *sua sponte* grant of summary judgment but rather an effort to put the parties on notice that the court's prior summary judgment ruling on damages was no longer good law in light of the *Ionics* decision. Therefore, as of the *in limine* ruling, neither party had established entitlement to judgment as a matter of law on the issue of damages. However, in consequence of the summary judgment proceedings and *Ionics*, it had become the law of this case that the plaintiff's purchase orders would be deemed to invoke any relevant "background legal rules" and that, to the extent the limitation-of-damages language in the defendant's invoices was in conflict with these rules, such language was not part of any contract between the parties pursuant to section 2-207 of the UCC. *Ionics*, 110 F.2d at 188 (overruling *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)). In these circumstances, none of the notice-and-opportunity concerns discussed in *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24 (1st Cir. 1996), are implicated, notwithstanding the defendant's reliance on

the *Berkovitz* case.[3] *See id.* at 29-30 (court may dispose of non-trialworthy claims *sua sponte*, but only by giving targeted party at least ten days to proffer evidence responding to court's concerns).

Following the close of the evidence, the defendant renewed its request for a jury instruction limiting the plaintiff's damages to the purchase price of the resin. The defendant took the position that the principle articulated in *Ionics* was not applicable because, although the defendant's invoices were in the record, the plaintiff had failed to introduce its purchase orders. Thus, the defendant reasoned, the record generates no "battle of the forms" in which to apply the *Ionics* rule.

Here it is necessary to concede that both parties may have been led astray by some improvident language in my order denying the *in limine* motion. I indicated that the plaintiff could assert claims for the full measure of damages available under applicable law "assuming the evidence adduced at trial conforms to the facts assumed" in my ruling. *In Limine* Decision at 7. My intent was to communicate to the parties that the ruling was provisional, and that either side was free to introduce evidence at trial that would lead to a different determination. Proper application of UCC

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[3] Further, there was actually no lack of notice and opportunity to be heard on the *Ionics* issue as suggested by the defendant. As noted, *supra*, the plaintiff's opposition to the *in limine* motion unambiguously communicated its position that *Ionics* stated the applicable rule. The defendant submitted a reply memorandum in support of its motion on June 17, choosing therein to state only that it "object[ed] to and disagree[d] with" the plaintiff's views on the subject. Reply to Plaintiff's Opposition, etc. (Docket No. 48) at 2 n.1. Finding that to be unhelpful, I directed the clerk on June 18 to contact the defendant and advise it that it would have a further opportunity to address the issue by filing a memorandum before 3:30 p.m. on June 19. The trial began on June 24. I appreciate that this put considerable pressure on the defendant, but the pressure was of its own making — particularly because the court agreed to last-minute and hurried briefing of the numerous *in limine* motions only at the request of the parties.

It also bears noting that the *sua sponte* determination at issue in *Berkovitz* had the effect of depriving the aggrieved party in that case of any opportunity for full development of the relevant factual record because the trial court entered final judgment in favor of the defendant. *Berkovitz*, 89 F.3d at 28. Here, there is nothing to suggest that the factual record was not fully developed on the *Ionics* issue and, indeed, the defendant identifies no specific evidence it might have produced that would have altered the outcome on the question.

section 2-207 is "purely a question of law," *Ionics*, 110 F.3d at 187, and the plaintiff was therefore entitled to rely on my ruling, communicated on the first page of the *In Limine* Decision, that as a matter of law the battle of the forms had been resolved in its favor. No trialworthy issue existed on the point absent some indication that the scenario assumed *in limine* was inaccurate.

Finally, I decline the defendant's invitation to revisit the substantive determination that under section 2-207, as interpreted in light of *Ionics*, the limitation-of-damages clause did not become part of any contract or contracts between the parties. In the main, the defendant is advancing no new arguments post-trial to justify reconsideration of the *in limine* ruling. The only possible exception is the defendant's contention that the plaintiff did not submit a purchase order every time it bought resin from the defendant, and thus that section 2-207 does not apply to at least some of the transactions at issue in the case. In the affidavit he submitted in connection with the summary judgment proceedings, Chipco President John M. Kendall produced a copy of his company's purchase order and stated that it was "used throughout the parties' relationship." Affidavit of John M. Kendall (Docket No. 11) at ¶ 29. Kendall testified for the plaintiff at trial, and the defendant did not explore this issue in its cross-examination. In fact, neither side made an issue of contract formation and the record is thus inconclusive as to whether the case involves one contract or a series of them. For all that appeared at trial, performance of the parties' respective obligations was the only matter in controversy other than damages. It is apparent that the defendant chose not to question Kendall about the purchase orders or otherwise bring the matter to the attention of the court or the plaintiff at trial, opting instead as a matter of strategy to see if the plaintiff would also fail to adduce evidence about the purchase orders prior to the close of evidence. In the circumstances the defendant cannot be heard to complain that section 2-207 may not be applicable as to the entire case because

there may have been contracts at issue that the plaintiff did not initiate with a written offer.

b. Other Asserted Grounds

None of the other grounds asserted by the defendant in support of its motion under Rule 59 for new trial, or for amendment of the judgment, warrant such extraordinary post-trial intervention by the court.

The defendant contends the plaintiff failed to adduce sufficient evidence to link the resin produced by the defendant to gaming chips the plaintiff had to replace for its customers because the chips were defective. I disagree. The jury heard evidence concerning when the plaintiff began using the defendant's resin and when it discontinued such use. It heard evidence that the defendant's customers were satisfied with the chips produced before and after the relevant period, and that it suffered a cavalcade of customer complaints during the time when the defendant's resin was in use. Although the plaintiff did not produce evidence concerning the provenance of every gaming chip at issue, or even every batch of gaming chips at issue, there was sufficient evidence to support the jury's implicit determination that defective chips were produced with the defendant's resin.

Likewise, there is not a basis for disturbing the verdict deriving from the possibility that the jury awarded damages that the plaintiff had not yet sustained at the time of trial. In arguing to the contrary, the defendant relies principally on *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993). In *Marquis*, the Law Court reversed a trial court's decision to vacate that part of a jury's award of damages in a breach-of-contract case that constituted the plaintiffs' lost profits in connection with their potato farm. *Id*. at 650. Noting that such damages must be proven to a "reasonable certainty," the Law Court determined that the claim for lost profits was not too

speculative in light of expert testimony relying on "carefully prepared data based on government statistics" concerning potato production. *Id*. (citations omitted). The instant case is simpler, in that the plaintiff's theory of what the defendant characterizes as "future damages" related not to suppositions about future trends in its industry but rather was a function of (1) the finite number of chips made with the defendant's resin and sold by the plaintiff, (2) the number of such chips that had been returned to the plaintiff under the two-year guarantee it furnished to its customers and (3) the number of such chips likely to be returned within the balance remaining in the guarantee period. The jury heard precise testimony about the first two numbers and, in the circumstances, was not engaging in improper speculation to the extent that its verdict depends on an inference as to the third.

Neither can I agree with the defendant that there has been a miscarriage of justice because the jury's damages award does not jibe with the data in the plaintiff's customer files and its financial statements for 1995 and 1996. Even assuming the defendant's mathematical analysis of this evidence to be correct, which the plaintiff assiduously contests, the product replacement costs and lost profits reflected therein were not the only basis for awarding damages to the plaintiff on its various claims. The jury was therefore entitled to award damages in excess of those the defendant contends are proven by the referenced trial exhibits.

Finally, the defendant contends it is entitled to a new trial because a reasonable jury could not have awarded damages to the plaintiff for chips it produced with the defendant's resin after the plaintiff knew that such chips were not performing satisfactorily. The defendant fixes the relevant point at either July 1995, when the plaintiff's production manager complained to the defendant about the quality of the resin, or October 1995, when the plaintiff received a customer complaint. According to the defendant, the plaintiff's knowing use of bad resin was at its own peril. This theory

ignores the ongoing contact between the parties aimed at solving the resin problems, and thus what the jury could have found to be the plaintiff's reasonable reliance on the defendant's representations that it would produce a satisfactory product for the plaintiff.[4]

The plaintiff's Rule 59 motion, seeking a new trial or amendment of the judgment, is therefore **DENIED.**

Dated this 22nd day of August, 1997.

David M. Cohen
United States Magistrate Judge

[4] The defendant also contends that the verdict entered against it was unfair because certain evidence adduced at trial was either not produced in discovery or produced too late to permit the defendant to make meaningful use of it. Most of these contentions were the subject of *in limine* rulings, and the defendant advances no new arguments that merit a fresh look at the issue. To the extent that any such challenged evidence was not covered by the *in limine* rulings, any asserted prejudice to the defendant was far too minor to warrant a new trial.